

THE COMMITTEE RELEASES A STATEMENT ABOUT A DECISION BY
THE U.S. COURT OF APPEALS ON PROXY ACCESS THAT PUTS DODD-
FRANK IMPLEMENTATION IN JEOPARDY DUE TO INADEQUATE
COST-BENEFIT ANALYSIS

WASHINGTON, DC, July 27, 2011—Last week the U.S. Court of Appeals for the D.C. Circuit struck down the SEC's recent proxy access rule. This decision is the latest in a string of defeats for the SEC based upon the failure adequately to consider its rules' effects upon efficiency, competition, and capital formation, as required by law. In each case, the court held that the SEC's lack of analysis on those economic factors makes the rule arbitrary and capricious, in violation of the Administrative Procedure Act.

These shortcomings in the rulemaking process contribute to the uncertainty facing our markets. The shortcomings have resulted in courts taking corrective action, which disrupts the markets by keeping regulations in a state of flux. The Dodd-Frank Act, which requires the SEC, the CFTC, and other financial regulators to write hundreds of rules in short order, makes the uncertainty even worse. In the view of the Committee on Capital Markets Regulation, the new rules that we have reviewed and commented on may suffer from the same problems as the ill-fated SEC proxy rule: they may not comply with the cost-benefit analysis currently required by law. Many of these rules are destined for challenge in the courts. The Committee has publicly stated this position in comment letters to the regulators and, since its first report in November 2006, has advocated for better cost-benefit analysis.

The solution is simple: the financial regulators must closely evaluate the effect their rules have on the fragile economy. President Obama recognizes this need. He issued two executive orders this year concerning cost-benefit analysis. Unfortunately neither applies with full force to the independent agencies, including the SEC and CFTC. Indeed, while these two agencies already have statutory requirements to conduct some basic form of cost-benefit analysis—which they may not have discharged—we believe the statutory mandate should be further strengthened.

The Commissions will not be able to do the necessary cost-benefit analysis without adequate funding, however, and we support such funding. If the Commissions lack the internal expertise to do the analysis themselves, they could enlist the assistance of nonpartisan outside experts.

One member of the Committee believes no clear guidelines exist for how to conduct an adequate cost-benefit analysis, or for courts' review of such analysis.